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THE GENIUS OF THE COMMON LAW.

VI. ALLIANCE AND CONQUEST.

THUS far we have spoken of the Common Law militant, striving with troubles at home and opposed to hostile powers without. It is now time to speak of our lady's triumphs in enlarging her borders. Little or almost none of this was done by force, much by judicious alliance and voluntary commendation. She did not go forth in manner of war to make her conquests, but was rather like a wise prince whose neighbours gladly seek his friendship, whose policy binds them to him by the commerce of mutual benefits, and whose government is a profitable example. We may read in many books of what the Common Law has borrowed or is supposed to have borrowed from other systems. It was once fashionable to exaggerate the importance of these foreign elements; later, and within recent memory, there was risk of undue depreciation at the hands of a school dominated by the Germanic tendency which was part of the general nationalist revival in Europe in the nineteenth century. We must not enter here on these larger aspects of historical thinking; but we note for our own purposes that students of the Common Law, being lawyers but no historians, were too long at the mercy of historians and antiquaries who were no lawyers or, what is worse, indifferent amateurs in law. Through successive generations, for about two centuries, English text-writers were ready, now to ascribe magical influence to "the civil law," of which they seldom knew a word at first hand, now to swallow legends of a feudal system that never existed in England, or again to fly to the other extreme and swear by a "mark system" that never existed anywhere. Rigorous in vouching and expecting authority for the assertion of any doctrine in their own law, they thought any kind of remote hearsay and unverified opinion good enough for histori-

cal fact. The prevalence of this uncritical temper may well be due to the bad example set by a great working lawyer whose mind was thoroughly unhistorical, Sir Edward Coke.[1] If Coke had been endowed with the scholarly method of a Spelman (to set up a mark more within reach than John Selden's unique learning and judgment) we might perhaps have had a historical school before the Germans. At this day we know that firm ground can be attained only by a training both legal and historical; the best of our law schools have already worked on this line long enough to show much good fruit and the promise of more. Let us now come to the facts; we must be content to deal with such as are well established, and I think we shall find those, taking them broadly as they stand, sufficient.

The Common Law, like the English language,[2] contains a great deal of mixed and composite material, but has an individual structure and character which are all its own; and, also like the English language, has on the whole had the best of it in competition with rivals. There is no case, I believe, of the Common Law having lost ground in presence of another system; there are certainly many where it has gained, and the question is forced on an inquiring mind, to use the words of a recent ingenious French writer: "A quoi tient la supériorité des Anglo-Saxons?" Whatever we might say if we could throw ourselves back into Coke's frame of mind, we can surely not be content to say that it is due to the intrinsic virtues of our race, or altogether to the superior justice or convenience of our rules. The more we look into other civilized modern laws, the more we shall find that under all differences of terminology and procedure the results come out not much unlike. No sane and impartial man will believe that in the main there is not as good justice in Edinburgh as in London, or at Montreal as at

[1]One or two recent writers have gone the length of calling Coke illiterate but this is an unjust reproach. His Latin prefaces are not classical, but they do not pretend to be, and there is nothing to show that he had any trouble in writing them. He was not a scholar like Bacon; very few lawyers were.

[2]It must not be supposed that English is alone in this respect. Modern Persian offers a remarkable analogy both in its wealth of adopted Arabic words and in its extreme grammatical simplicity. My Oriental studies are too slight to enable me to say how much attention this analogy has received from philologists. In Urdú, the current polite language of Northern India, we have a large Persian vocabulary, including much imported Arabic, added to a Hindí stock of which the original structure is unchanged. In both cases there has been large adoption of exotic literary form; there does not seem, however, to be any parallel in either to the organic influence which the Romance elements have exercised in English.

Toronto. Besides, one thing the boldest champion could never say in our praise is that we take any pains to make our ways easy for strangers who have a mind to learn them. The fact remains that the Common Law shows an assimilative power which, to all appearance, grows by what it feeds on. Therefore it must have started, even in its rude infancy, with some definite advantage. The suggestion I am about to put forward does not purport to give a complete explanation, but I hope it is sound as far as it goes.

As it emerges into distinct view in the late twelfth and early thirteenth century, our law is perceived as wielding one jurisdiction among many; so far eminent, no doubt, as it is in a special manner the king's. But the king recognizes and protects the other jurisdictions too, if indeed, as regards the Church, there is any talk of protection rather than of equality or even claims to supremacy. Is there, then, any other distinctive character? Yes, there is this great difference, that other laws are special and personal, while the Common Law is not. It is the law not of a class or of a kindred, but of the whole kingdom and the men who dwell therein; *lex et consuetudo Angliæ* is its proper style. On the other hand the canon law, to take the case of the greatest rival, is personal though it is universal. Doubtless it is binding on all Christian men, but it is the law of Christians only; we do not speak here of the justice which many prelates, from the Pope downwards—say, for a domestic example, the Bishop of Durham—administer as temporal princes with territorial jurisdiction, for, though such justice may be bound in principle[3] to accord with the law of Holy Church, it is in itself not spiritual but secular. Doubtless, also, the Common Law assumes that the king's subjects in general are Christians in the obedience of the Church; it is by no means clear that others, Jews for example (if indeed this be not the only practical case) had any right to our lady's protection down to the end of the Middle Ages and even later;[4] but it is clear that all men dwelling

[3] In England the Bishop of Durham's secular law followed the king's so closely that his temporal court issued in his name prohibitions directed to himself as judge of his spiritual court.

[4] No one appears to have doubted Edward I's right to banish the Jews by a mere act of royal authority. Prynne, under the Commonwealth, wrote a violent controversial tract against their readmission, accepting all the medieval fables about sacrificial murder or circumcision of Christian children. Presumably the king might at any time have given his protection to individual Jews as an exceptional favour. But I rather think that, so far as the presence of Jews was winked at after the expulsion, the toleration was informal and precarious; nor was there ever any formal restitution.

on English ground have to abide English law, the law of the king's courts, unless they can show some special reason to the contrary. That, indeed, is what "the common law" means. Therefore our lady the Common Law takes, as matter of course, whatever other jurisdictions have left for whatever reason, and keeps it with very little chance of losing it again. Moreover, being of a free hand, she knows how to take as well as to give nobly and without false shame, which is a high point of generosity and something of a divine secret. Her cloak will open as wide as the Madonna's, and the children she welcomes under it are adopted for her very own. Where the occasion was not ripe for full intimacy, she has been politic in making friends of rivals and possible adversaries.

Chief among her allies and companions is Equity, who has at last come to keep house with her in England though not in all her dominions. Their days of strife are over; it is not easy to be sure how much of the strife was genuine. On certain points there was definite conflict; but the sixteenth-century complaints which reiterate a general charge of administering vague and capricious natural justice may be thought to savour of controversial common form, employed to cover the unavowable motive of dislike to effectual competition. Anyhow, the battle of judgments and injunctions in which King James I and Bacon finally had their will of Coke seems to us nowadays a battle fought very long ago. There were other and later jealousies which crossed the Atlantic with the Puritans and have left pretty recent traces, if I mistake not, in some American jurisdictions; but the causes of these were more political than legal. At home the relations of law and equity, once put on a correct footing, became harmonious and profitable, and have steadily improved for more than two centuries. Each system, being compelled to understand something of the other, learnt also to know itself better. Equity has enriched the Common Law, the common law has clarified Equity. We have discovered, of late years, at any rate, that many doctrines which had been supposed to be mysteries of the Chancery were in truth very good common law. We have done with the punctilio which forbade equity judges to decide a purely legal question; we have long known that a good equity lawyer must build on a solid common law foundation; real property law, indeed, may be said to have been too much left to specialists of the Chancery Bar in modern times. We have all but done with the old attitude of distant and formal respect veiling something like a contemptuous incredulity. Very soon it will cease

to be possible for a man to have a reputation for skill in the Common Law without at least an elementary knowledge of equity. Readers of English reports of the last generation, in the early days of the so-called fusion, may, by this time, find a quaint archaic flavour in the confessions of ignorance uttered with a certain ostentation by sturdy common law judges of the old school. But, while Bramwell declared that he could attach no meaning to constructive fraud (having satisfied himself, presumably, that the constructive possession and constructive delivery of modern commercial law were simpler notions), Bowen could with the utmost courtesy, and more justly and profitably, point out that Jessel, surpassed by none among recent equity lawyers, and perhaps equalled only by Cairns, had underrated the resources of the Common Law. With regard to the contributions made by equity jurisprudence to what is now the common stock, it is well known that they account for most of our Romanist importation. Here it is needful to call to mind the warning given a good many years ago by Langdell. The learning and procedure of the early Chancellors might well enough be called Roman, but not in the classical sense of modern scholars. As between the two rival branches of jurisprudence outside England, they belonged not to the civilian, but to the canonical side; and therefore, when we think we are on the track of Roman influence anywhere between the thirteenth and the seventeenth centuries, it is quite unscientific to jump to a modern edition of the Corpus Juris.

Some trafficking with canon law, but not much, came in a more direct way through contact with ecclesiastical jurisdiction; and maybe some with pure civilian learning, but very little from admiralty law. The practitioners in those branches were quite separate in England from those of the Common Law till 1857, and indeed the law and procedure of our Probate Divorce and Admiralty Division retain most of their old special features to this day. Much more important were the relations of the Common Law with the cosmopolitan doctrine of the Law of Nature, certainly not the least notable product of medieval intellect.[5] Our grand pervading principle of Reasonableness, which may almost be called the life of the modern Common Law, is intimately connected with it. St. German, the first of our comparative jurists, pointed this out with

[5]Opinions may differ on the amount of originality shown by the lawyers and schoolmen of the Middle Ages in adapting their Greek and Latin material. My own estimate of it is very high.

admirable clearness in the forefront of his "Doctor and Student," but for about three centuries and a half he spoke to deaf ears. I have written of this matter elsewhere, and my friend and successor at Oxford, Professor Vinogradoff, worked out some details of great interest at the last Historical Congress in Berlin. During the classical period of medieval English law the king's judges were quite aware of the Law of Nature, and sometimes (though, as St. German says, not usually) appealed to it by name. This is a topic on which proper critical study of the later Year Books may yet bring us new light. We are, however, fairly well informed as to the most practical applied branch of the Law of Nature, namely the Law Merchant. Here we find the greatest of our lady's acquisitions, the more remarkable because it was made in a generation not otherwise distinguished for creative power or large enterprise. The king's law had always recognized the law merchant as having its proper sphere; royal charters even prescribed its use.[6] There were sporadic attempts at pleading it in ordinary litigation, first avowedly, later by fictions of special local custom. But it clearly would not do for the king's court to admit parties to be judged by any other law than the king's, and in the absence of a general doctrine of contract there was no other way. When the action of Assumpsit had enlarged not only procedure but ideas, mercantile causes could be brought before the court on the footing, not that the parties were persons subject to the law merchant, but that they had agreed to be bound by the custom of merchants. In this sense it could be said in the seventeenth century that the law merchant was part of the Common Law: Blackstone had no difficulty in adopting this statement, writing just before Lord Mansfield's work began. We do not know exactly why business men wanted, after the Restoration, to come into the king's court, but we may surmise that on the one hand the domestic jurisdiction of trade gilds, whether of Englishmen or of foreigners in England, had broken down for economic reasons, and, on the other hand, the summary process of local market and maritime courts failed to ensure much certainty in the substance of their judgments. Perhaps, too, the executive powers of the local courts, in spite of their customs of attachment, left something to be desired. In London the aid of the Chancellor had been invoked to determine the commercial matters of strangers by "the law of nature in the Chan-

[6] As in the Court of Yarmouth Fair, *temp.* Ed. *I.* Montagu Burrows, Cinque Ports, 170.

cery;" the practice was to refer the case to a commission of merchants, and Malyes, who tells us this, also tells us that it was not expeditious. Only two steps more were needed to complete the desired transfer to common law jurisdiction. The first was to treat the averment of the parties having contracted according to the custom of merchants as merely formal, or the form of the instrument itself as conclusive evidence of that intention; and this was done in the early part of the eighteenth century at latest. The second, which was reserved for Lord Mansfield, was that the Court should not treat the law merchant as an exotic law to be proved by evidence in every case, but should be bold to take judicial notice in the future of what had once come to its knowledge. Thus general mercantile custom, provided it were really general, became in the fullest sense matter of law. From the point of view of the Common Law the triumph was perfect. The Law Merchant, however, had to pay her footing for admission to our lady's house by submitting to the procedure of the common law courts and its incidents, including legislative regulation such as the Statute of Frauds. In the middle of the nineteenth century Parliament made amends by providing a new summary procedure on bills of exchange, afterwards extended to all liquidated demands to which it appears, on the proper interlocutory application, that there is no substantial defence. Remembering that in England at any rate, the majority of actions are undefended, we cannot doubt that Order XIV (so it stands in our Rules of the Supreme Court) is among the most beneficent inventions of modern procedure; and the history shows that indirectly we owe it to the law merchant. For a parting word concerning Lord Mansfield, let us note that, being a Scotsman by birth, he followed, consciously or unconsciously, the Scottish tradition of cosmopolitan jurisprudence rather than the insular learning of the Inns of Court. Without that temper, made a ground of reproach against him by short-sighted enemies, the peaceful conquest of the Law Merchant by the Common Law might not have been achieved, or not so well. Certainly it was a happy day for our lady the Common Law when she took William Murray into her service; and yet we shall hardly count it mere luck. We do not refuse to ascribe merit to a sovereign who attracts the best men to his court, whether he knows or does not know precisely what their services will be. Mansfield, indeed, failed in some of his experiments which went farther on less open ground, so that two or three of his reported judgments now stand for warning rather than

example. Yet nothing worse can be said of his unsuccessful ideas than that they came too late to find room in a systematic doctrine already settled.

About the same time that the annexation of the law merchant was completed, our lady began to extend her influence beyond seas in various ways. I do not speak here of the simple transport of English law by English colonists to countries where no civilized law was in possession, but only of cases where another system or tradition was there already. If, indeed, a few historical circumstances had been different, there might have been curious questions as to the local law of colonies by settlement. Nobody, for example, ever heard of a colony being under the law of Scotland, not even Nova Scotia. But what if there had been Scottish colonies before the Act of Union? At this day I conceive it may be a theoretical question what is the proper law of a ship registered in Glasgow and sailing from the Clyde. The British ensign is no more English than Scots or Irish. Under what law would a boat's crew be who landed from such a ship on an unclaimed island? The practical answer is that the modern maritime law of the two jurisdictions is identical either by statute or as part of universal sea law. But certainly there is no authority for assuming that English law, as such, is the general national maritime law of British subjects, though I have known arguments reported which seemed to make that assumption, or even to extend some such doctrine of the "predominant partner" to the conflict of laws on land. Not that any qualified person could dispute, even in the most adventurous argument, that a conflict of this kind is just as possible between English and Scottish rules as between any others, say those of Maine and Ontario. Here, however, we are near touching on one of our lady's little secrets, or rather a family secret of all jurisprudence, namely, that any clever student can put a number of questions which lawyers and men of affairs, in the exercise of their common sense, have tacitly agreed to avoid in practice. Only one law, the Common Law, has ever gone forth into the world beyond the narrow seas under or in company with the British flag; and wherever the British flag has gone, much of the spirit of the Common Law has gone with it, if not of the letter also. Everywhere our system has made its mark, and often without official countenance. We should not expect this influence to operate alike in all parts of the law, nor to manifest itself in an invariable fashion in different and remote jurisdictions, nor do we find it so. The tendency to imitate English models is strongest in criminal and

constitutional law, considerable in mercantile law; while in the private civil law of property (excluding real estate) and obligations it is less, though not negligible, and in the regions of real estate, the family and succession it hardly exists; as indeed those are not the parts of our system which any English lawyer would recommend for general adoption. Most remarkable is the success of English criminal law, for it would be hard to name a British possession where it does not prevail under one form or another. In substance it compares not unfavorably with other systems, and this needs no proof; it is obvious that otherwise it would have no serious chance in competition. Certainly the substantial merits of our criminal law get no help from its form. In point of form it has almost every possible fault. It is incumbered with archaic and clumsy definitions rendered yet more obscure by centuries of judicial construction which has pursued no uniform policy. The worst example in this kind is the definition of larceny at common law; this goes back to Bracton's adaptation (not literal copying) of Roman terms which he possibly did not understand and his successors certainly did not; and the result is that the question whether a certain act was larceny, or some other offence, or no offence at all, may be a dialectic puzzle capable of dividing judicial opinions in the last resort, involving reasons of the most subtle kind, and wholly unconnected with the merits.[7] The fruits of legislation have been little better. Gaps have been filled up from time to time by the creation of statutory offenses, equally without any continuous plan, and often with lamentable shortcomings in both learning and draftsmanship; and with all this accretion of legislative new matter and amendment the old misleading definitions were treated as too sacred to be touched. Yet, strange to say, the occasions on which the difficulties come to the surface have long been so uncommon that a man may have a large criminal practice and know next to nothing of them. The genius of the Common Law has somehow contrived to extract from all the theoretical confusion a body of law which is quite well understood by those who handle it, and quite sufficient for every day needs, and has the reputation of being, on the whole, just and merciful.[8] Com-

[7] I have known one man who thoroughly understood the law of larceny, the late Sir R. S. Wright.

[8] All such terms, it will be understood, are relative. We are going through something like a revolution in our notions of punishment and penal discipline, and still more of preventive measures at an early stage. These things, however, belong only in part to the domain of substantive law.

plaints almost invariably relate to the exercise of judicial discretion in sentences, especially in inferior courts, or of executive discretion in granting pardons; and I do not myself believe that any material abridgment of the judge's discretion, which certainly is very large, would in England be popular or beneficial. Thus our criminal law looks at first sight as hopeless a task for the codifier as the law of real property, but in truth lends itself to codification as well as any other branch. After that operation its intrinsic merit becomes visible, and its conquests in codified form have been extensive. Of such codes we have two types. In British India the criminal law of England was enacted in a systematic and simplified recension for a territory where the Common Law had never been in force; on the other hand, statutes have been framed for many English-speaking states with the purpose of codifying the criminal law already followed within the jurisdiction.

Now the Indian Penal Code, drawn chiefly by Macaulay more than two generations ago, has not only been in force in British India more than half a century, but has been largely copied in other countries under British rule or influence from Hong Kong to the Sudan, and among them Ceylon, where we found Roman-Dutch law in possession. In India the Company's courts had endeavoured, honestly but with no success, to adapt the penal law of the Koran, imposed by the Mogul dynasty of Delhi, to modern social conditions. It is curious to read that after Macaulay's death in 1859 Harriet Martineau, a person of universal information who was often ill-informed, pronounced his draft a complete failure. She may have taken the opinion of some philosophical Radical who disliked Whigs in general and had not forgiven Macaulay's attack on James Mill in particular. In 1860 the Penal Code was enacted, and it may be said with confidence that few codes have needed so little amendment. Turning to the other type, in which the Common Law is reduced to writing for settlers of European civilization, we find one notable parallel to the case of Ceylon. In the Province of Quebec, as we all know, the old French laws and usages of Lower Canada were preserved in civil matters, but English criminal law was introduced very soon after the British conquest, apparently without objection; and accordingly the modern Criminal Code of Canada applies to the whole of the Dominion. Mauritius gives us an example of a Crown Colony where the criminal law is English and the civil law French. In this case the circumstances were not altogether similar, as the conquest took place before the promul-

gation of Napoleon's codes was complete. One or two colonies have been Anglicized by degrees, beginning with criminal and public law. Trinidad is a curious, perhaps a singular instance. This island was conquered from Spain late in the eighteenth century. The old Spanish law was administered by the first English officials, and has never been abrogated except by the piecemeal enactment, first in one branch and then in another, of rules closely following English models, or sometimes, in procedure ordinances, Anglo-Indian. By this time the whole law of the colony, civil as well as criminal, is substantially English, with one odd lacuna. Marriage, in a Spanish colony, naturally came under the exclusive jurisdiction of the Roman church. English governors could not administer Roman ecclesiastical law, nor admit the Catholic archbishop as an independent coördinate authority, nor yet introduce a new jurisdiction which the conscience of almost all the inhabitants would have declined to recognize. The result was that Trinidad had to do without any matrimonial jurisdiction at all. But this by the way. There seems to be no doubt that English criminal jurisprudence has an attractiveness which goes beyond the merits of its particular rules and cannot be explained by purely juridical reasons. Questions as to the rights of the citizen and the powers and duties of the magistrate may arise in almost any kind of contentious proceeding and in fact are not infrequent in civil jurisdiction. But in criminal matters they are often the only or the principal material issues; they involve graver consequences and are presented with a more dramatic emphasis. Our fathers laboured and strove chiefly in the field of Crown law to work out those ideals of public law and liberty which are embodied in the Bill of Rights and are familiar to American citizens in the constitutions of the United States and of their several commonwealths. English and American books of authority on public and particularly criminal law deal at large with these questions in many places, and the fundamental assumptions have for fully two centuries been treated as indisputable. Pleas of the Crown, to use the old English catchword, have a far higher scope than the repression of vulgar crime. Precedents of this class have varied and will continue to vary in form, as they are versed in the special institutions of British, American, Canadian or Australian government; but in every case they exhibit in action the ultimate political principles of the Common Law which belong equally to all our kindred nations. By this deeper political significance our criminal law has gained a world-wide influence in spite

of its superficial technicality. Further, our criminal procedure, being associated most intimately with the elements of civic freedom as we understand them, has been not only admired, but imitated, in countries to which the Common Law is otherwise wholly foreign. The spread of trial by jury in the nineteenth century is one of the most remarkable events in the general history of legal institutions. It is not our business here to inquire whether the delicate operation of borrowing details from a foreign system has always been performed with full knowledge or with all desirable prudence.

Something remains to be said of the cases where Englishmen, or men of substantially English training and imbued with the Common Law, have been confronted with a legal system of Roman or Romanized form in the handling of ordinary civil affairs. Here the effects have been less conspicuous than in public law, but they have not been insignificant. The leading examples are those of Roman-Dutch law in South Africa (and on a smaller scale in Ceylon) and French law in the Province of Quebec. In each case the old European law which existed at the time of the British conquest has been scrupulously preserved, and whatever weight official authority has in such a matter is thrown into the same scale and against any encroachment of common law doctrine. Yet, in the contact of the two sets of ideas, we shall find that in each case our lady the Common Law has given rather than received. If there is a doctrine in our law more peculiar than another and less easy for a foreigner (or even a Scots lawyer) to understand, it is the doctrine of Consideration. Roughly stated, it seems plain and sensible. The court will hold people to their bargains, but will not enforce gratuitous promises unless they are made in solemn form (and not always, or in the fullest sense of the word, then). But that was not the way in which the rules were developed, nor is the language of the authorities so simple. For ordinary business the rough statement is practically correct; the application to various unusual but not unknown cases has been made subtle and obscure by excessive dialectic refinement. Moreover, the Roman law of obligations arising from contract cannot be reduced to any such general form, nor, so far as I know, the corresponding law in any modern system derived from it. Yet this particular doctrine has lately been grafted on the Roman-Dutch law in at least one South African jurisdiction. The decision does not seem elegant, and I should doubt, with great respect, whether it is useful; but the fact remains

that it has been made. In the Province of Quebec things have not gone so far, but the English term has left its mark on the language, if not on the substance, of the Civil Code promulgated in our own time. This is the more notable because the lawyers and legislators of that Province are not, as a rule, men bred in the school of the Common Law. Recently a new body of law has come into being in Germany, which resembles ours in being both composite and original, but differs from it in being the product of a systematic design deliberately worked out with the best learning and skill available. There are signs that the influence of the German Civil Code in neighbouring lands, perhaps farther afield also, will make an interesting chapter of legal history before long.

Apart from the actual contents of the substantive law, it is remarkable that everywhere under the British flag—I think it may be said without exception—our forensic and judicial habits have prevailed. In particular the custom of attributing exclusive or all but exclusive authority to judicial decisions, as distinguished from extra-judicial opinions of even the most learned persons, has spread far beyond the bounds within which English law is administered or followed. One may find indeed that imitations of our methods is now and then carried to excess. Not only the decisions of Indian superior courts and of the Judicial Committee on appeal therefrom, but those of English courts, are cited wholesale throughout British India, frequently by advocates who cannot know much of the Common Law and before judges or magistrates who may know as little; and the citations, one suspects, are too often not even from the report but at second hand from text-books. Even technical rules of English real property law have been relied on in Indian courts without considering whether they had any reasonable application to the facts and usage of the country. Some Indian judges, even in the superior judgment seat of the High Courts, have forgotten that the law they administer (with strictly limited exceptions) is not English law as such, but "justice, equity and good conscience," interpreted to mean so much of English jurisprudence as appears to be reasonably applicable, and no more. Blind following of English precedents according to the letter can only have the effect of reducing the estimation of the Common Law by intelligent Indians to the level of its more technical and less fruitful portions, and making those portions appear, if possible, more inscrutable to Indian than they do to English lay suitors. Still all this homage is done to the Common Law, whether with the best

of discretion or not. Neither are the blunders our lady's fault. Like others who bear rule in high places, she has to assume a certain measure of common sense in her officers.

It would not be wise or just to conclude, on the strength of such facts as we have rapidly surveyed, that our legal system must in itself be better or more convenient than all other actual or possible ones. But the facts, being for the more part independent of official authority or persuasion, do give proof of a certain masterful potency, not the less operative because not easy to define. Maitland found the right word for this quality. The Common Law, whatever else it may be, is pretty tough. Moralists may determine (or have determined in several irreconcilable ways) whether any and what active virtues are of a higher order or have greater merit than toughness. At all events it is of the kind that prevails.

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